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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 694

NORTHEAST AIRLINES, INC.,

Petitioner,

—against—

MARILYN W. PEARSON, as Administratrix of the Goods, Chattels and Credits of John S. Pearson, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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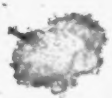

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NORTHEAST AIRLINES, INC.,

Petitioner,

—against—

MARILYN W. PEARSON, as Administratrix of the Goods, Chattels and Credits of John S. Pearson, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Statement of Case

Respondent, Marilyn W. Pearson, widow and Administratrix of the Estate of John S. Pearson, appointed by the Surrogate's Court of New York County, and a citizen and domiciliary of New York, commenced the present action against petitioner Northeast Airlines, Inc. to recover damages for the death of her husband, caused by the negligence of the petitioner. Northeast Airlines is a Massachusetts corporation authorized to do business in New York. Pursuant to that authorization, it maintains ticket

offices throughout the State of New York, and actively promotes the use of its air transportation facilities by New York citizens by means of widespread advertising. It operates a full schedule of flights from New York airports and earns a substantial amount of revenue from New York citizens. The decedent, a New York citizen and domiciliary, purchased his flight ticket at the New York offices of Northeast Airlines. He boarded the Northeast airplane at LaGuardia Airport, in the City of New York, on August 15, 1958. Late that evening, the airplane in which decedent was riding crashed while attempting to land at Nantucket Airport.

Reasons for Denying the Writ

1. Numerous past decisions of this Court have clearly established the general principles applicable to this case.

The general principle of law applicable to this case is that the forum state may constitutionally apply its own law to the decision of a case involving the laws of other states, if it has sufficiently substantial contact with the activity in question.

This principle has been enunciated clearly by this Court in many past decisions. See *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U.S. 532 (1935); *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145 (1932); *Pacific Employers' Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493 (1939); *Watson* v. *Employers' Liability Assurance Corp.*, 348 U.S. 66; *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1943); *Vanston Bond-*

holders Protective Committee v. *Green*, 329 U.S. 156 (1946). Not a single one of these cases is cited or discussed by the Petitioner, which erroneously asserts that the issue has never been passed upon by this Court (petition, p. 10.)

Within the past year, this Court has reaffirmed this basic principle with unmistakable clarity. Speaking for a unanimous Court in *Richards* v. *U.S.A.* (369 U.S. 1), Chief Justice Warren stated:

> "Where more than one state has sufficiently substantial contact with the activity in question, the forum state, by analysis of the interests possessed by the states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity." (369 U.S. 1, at p. 15)

In the *Richards* case, the unanimous opinion of this Court also cited with approval two state court decisions following the identical principle here involved: *Grant* v. *McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944 (1953); and *Haumschild* v. *Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W. (1959), both cited in *Richards* at 369 U.S. [illegible] n.26. This Court also there cited with approval the authoritative article by *Currie, Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1958). See also the later article by *Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 Univ. of Chi. Law Rev. 9, which reviews many of the pertinent decisions of this Court. See also, *Cavers, A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933).

2. This Court has recently ruled upon the exact facet of the general principle here involved: *partial* application of a foreign statute by the forum state.

Wells v. *Simonds Abrasive Co.*, 345 U.S. 514 (1953) settled the issue which Petitioner claims has never been ruled upon by this Court.

In the *Wells* case plaintiff commenced an action in the federal court in Pennsylvania to recover damage under the Alabama wrongful death statute for a wrongful death which occurred in Alabama. The Alabama wrongful death statute had a built-in statute of limitation of two years; Pennsylvania's period of limitation on wrongful death actions was one year. The action was commenced after the expiration of the Pennsylvania one year statute but prior to the time the Alabama two year statute expired. The issue was whether the federal court sitting in Pennsylvania in a diversity case and applying the law of Alabama *partially*, was compelled to apply the Alabama statute *completely*, including the built-in limitation of the Alabama statute. This Court held that the federal court sitting in Pennsylvania could apply part of the Alabama statute, and could also apply part of the Pennsylvania statute, without violating the Full Faith and Credit Clause. This Court stated:

> "However, there have been divergent views when a foreign statutory right unknown to the common law has a period of limitation included in the section creating the right. The Alabama statute here involved creates such a right and contains a built-in limitation. The view is held in some jurisdictions that such a limitation is so intimately connected with the right that it must be enforced in

> the forum state along with the substantive right. We are not concerned with the reasons which led some states for their own purposes to adopt foreign limitations, instead of their own, in such a situation. The question here is whether the Full Faith and Credit Clause compels them to do so. Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state. * * * *Differences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis of constitutional distinctions under the Full Faith and Credit Clause.*" (345 U.S. 517, 518; emphasis supplied).

The *Wells* case was a reaffirmation of this Court's earlier holding in *Alaska Packers Ass'n* v. *Industrial Acc. Commission*, 294 U.S. 532 (1935) to the effect that a rigid literal application of the full faith and credit clause in cases where one state statute comes in conflict with another must give way to a flexible interpretation which would permit the appraisal of the governmental interest of each state. Speaking for a unanimous Court, Mr. Justice Stone stated:

> "In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes in conflict with that of another, the necessity of some accomodation of the conflicting interests of the two states is still more apparent. A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict

arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another. . . .

The necessity is not any the less whether the statute and policy of the forum is set up as a defense to a suit brought under the foreign statute or the foreign statute is set up as a defense to a suit or proceedings under the local statute. In each, rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." (294 U.S. at 547)

In the various proceedings below, Petitioner made some abortive efforts to distinguish the *Wells* case from the *Kilberg* situation. Now, Petitioner has abandoned the attempt to distinguish *Wells*, and instead, ignores the decision and tells this Court that it has never considered the point before. This is not surprising, in view of the fact that *Wells* represents a more extreme situation than *Kilberg*, for *Wells* dealt with a "built-in" statute of limitations which was an integral part of the right created by the Alabama statute.

Another probable reason for Petitioner's omission of the *Wells* case from its petition is that this Court in *Wells* distinguished two cases heavily relied upon and cited by petitioner, *Hughes* v. *Fetter*, 341 U.S. 609 (1951) and *First National Bank* v. *United Air Lines, Inc.*, 342 U.S. 396 (1952), on the grounds that the states involved in those cases "laid an uneven hand on causes of action arising within and without the forum state" and discriminated against those causes of action arising outside the state, whereas Pennsylvania applied her limitation to all wrongful death actions. (345 U.S. at 518, 519). *Hughes* expressly disclaimed any intention of passing on the applicability of foreign law, and, supporting the position of this respondent, reaffirmed the basic right of the court to apply the law of the forum:

> "The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that '*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted' " (341 U.S. 609, 612, n. 10)

The broad and general statement concerning the "strong unifying principle" of the full faith and credit clause made by the Court in the *Hughes* case did *not overlook the fact that that clause is not an absolute* rule to be aplied mechanically when a state is shown to have a legitimate interest in the controversy. And this is also true when the foreign statute is set up as a defense to a suit under the foreign statute. (See *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U.S. 532; *Vanston Bondholders Protective Com-*

mittee v. *Green*, 329 U.S. 156, 161-162; *Wells* v. *Simonds Abrasive Co.*, *supra*; *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493; *Carroll* v. *Lanza*, 349 U.S. 408; *Watson* v. *Employers Liability Ins. Corp.*, 348 U.S. 66).

Petitioner has also ignored this Court's decisions in *Massachusetts Bonding & Insurance Co.* v. *United States*, 352 U.S. 128 (1956) and *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

In *Massachusetts Bonding* this Court sanctioned the "segmentation" of the very same Massachusetts wrongful death statute involved in the instant petition. In that case, the standard of liability imposed by Congress in the Tort Claims Act (compensatory damages) was in direct conflict with the standard of liability under the Massachusetts death statute (punitive damages). This Court held:

> "When Congress rejected liability for 'punitive' damages, we conclude it went the whole way and made inoperative the rules of local law governing the imposition of 'punitive' damages. When Congress adopted 'actual or compensatory damages,' measured by the 'pecuniary injuries,' as the measure of liability in those States that awarded damages 'only punitive in nature,' we conclude it did not preserve as a limitation on 'compensatory' damages the limitation imposed by local law on 'punitive' damages." (352 U.S. at 134).

A conflict in the expressed policy of Congress with that of Massachusetts was resolved against the interests of Massachusetts in an action in which Massachusetts presumably had more significant contacts with the matter than it had in *Kilberg*, or in the instant action.

In *Klaxon Co.* v. *Stentor Electric Mfg. Co., supra,* this Court also gave its approval to the forum's application of its own law and policy to deny a *part* of the claim asserted by plaintiff under the "applicable" foreign law.

3. The decision below involves only New York state law and is applicable only to the Second Circuit. The entire bench of the Second Circuit sitting *en banc* has passed upon the case.

Although Petitioner attempts to exaggerate the the applicability of the *Pearson* decision, the scope of this case is limited to New York. To date, New York is the only state which has implemented its public policy against limited death damages by applying its own measure of damages through decision of its highest court (*Kilberg* v. *Northeast Airlines*, 9 N.Y. 2d 34).

New York itself, and a number of other states, have long had constitutional provisions prohibiting limitations in wrongful death actions. New York's constitutional provision dates back to 1894 (Art. 1, §18). However, until the decision by New York's highest court in the *Kilberg* case, New York applied the law of the place of the accident, even if it contained limitations on damages (*Baldwin* v. *Powell*, 294 N. Y. 130; *Maynard* v. *Eastern Air Lines*, 178 F. 2d 139 [2d Cir.]). Therefore, the mere existence of restrictions in various state constitutions does not give the *Kilberg* and *Pearson* decisions any effect in cases pending outside of New York.

This is shown in one of the cases cited by Peti-

tioner in its Petition: *Goranson* v. *Kloeb*, 303 F.2d 655 (6th Cir. 1962).

In that case, an action arising out of an airplane crash in Virginia (which has a limitation on death damages) was commenced in the Ohio state courts and then removed to a federal district court in Ohio on diversity grounds. Ohio has no limitation on death damages, and has a constitutional prohibition against such limitations, similar to the New York provision. Defendant's motion to transfer the case to a federal district court in Virginia was granted and was upheld by the Sixth Circuit, which ruled that the *Kilberg* principle did not apply in Ohio since the Ohio state courts had not made any pronouncement that they would apply Ohio death damages in such situations. Thus, without a *Kilberg* type decision by the state courts, the provisions of state constitutions have no automatic application to these situations.

A similar result was reached in *Popkin* v. *Eastern Air Lines, Inc.*, 204 F. Supp. 426 (E.D. Pa. 1962), also cited by Petitioner. There, the plaintiffs sought to invoke the Pennsylvania constitutional provision against death limitations, but again, it was found that the Pennsylvania state courts had not yet ruled on the question, so the federal court was powerless to apply, unlimited Pennsylvania death damages.

These decisions point up the purely local nature of the *Kilberg* and *Pearson* decisions. There is nothing to prevent other states from following the *Kilberg* principle in cases where they have sufficiently substantial contact with the activity in question. At this time however, the question is purely one of New York law. If other states follow the *Kilberg* princi-

ples, this will be purely a matter of state law in each case, subject to the basic rules already laid down clearly by this Court in decisions cited in Points 1 and 2 of this brief.

Therefore, Petitioner's claim that the "question presented is an important one which has been or will be presented in every case where the state is required to apply the laws of another state" (petition, p. 13) is simply not correct.

Petitioner has used the same tortuous reasoning in a vain attempt to dilute the impact of the *Richards* case. In its Petition (pp. 11-12), Petitioner claims that this Court held Missouri law applicable to actions pending in the Oklahoma courts, arising out of an accident occuring in Missouri. A mere reading of the *Richards* opinion shows that this Court applied Oklahoma law, including the Oklahoma conflicts rules, which themselves required application of the Missouri law (369 U.S. at 16, and n. 35; 285 F.2d 535 (10th Cir. 1960)). While Oklahoma had the same constitutional provision as New York, it did not have a *Kilberg* type decision. If the Oklahoma state courts had rendered a decision similar to *Kilberg*, it is obvious that the opposite result would have been reached in *Richards*. This Court stated at 369 U.S. 15:

> "Thus, an Oklahoma state court would be free to apply either its own law, the law of the place where the negligence occurred, or the law of Missouri, the law of the place where the injury occurred, to an action brought in its courts and involving this factual situation.

The *Pearson* case has received the most careful attention of the Second Circuit, which sat *en banc*. There is no reason to burden this Court with a matter involving only New York law and limited to the Second Circuit; and there is no reason for a widow to wait any longer for the just compensation which is due to her for the loss of her husband.

4. Granting the Petition would involve this Court in the minutiae of weighing contacts, and in factual issues which are normally left to lower courts.

In the final analysis, Petitioner is asking this Court to rule that New York did not have sufficiently substantial contact with the activity in question to apply its own law to this case. This is the only way that Petitioner can possibly hope to escape the authority of *Wells*, *Richards* and other clear precedents cited herein.

New York's contacts with the activities in this case are so strong that Petitioner never seriously questioned their sufficiency in the proceedings below. Indeed, the entire bench of the Second Circuit sitting *en banc* unanimously found the contacts sufficient, for Judge Friendly, at the very opening of his dissenting opinion *en banc* states:

> "I find nothing in the Federal Constitution that would prevent the legislature of New York from amending its wrongful death act, Decedent Estate Law, §130 et seq., to include the death in a sister state of a New York resident traveling on a flight from New York on a ticket purchased in New York, or the courts of New York from now read-

> ing its wrongful death act to cover such a case. Whether any one of these 'contacts' would alone warrant New York in thus applying its own wrongful death act and refusing any 'faith and credit' to the 'public acts' of the sister state, certainly the combination does. So far as concerns the issue here, *Alaska Packers Ass'n* v. *Industrial Acc. Comm'n*, 294 U.S. 352 (1935) and *Richards* v. *United States*, 369 U.S. 1, 15 (1962), indicate that but no more than that." (Petition, p. A-63)

The overwhelming New York contacts and legitimate interests include the following:

1. Plaintiff and plaintiff's decedent husband were, and plaintiff still is, resident in New York.

2. Plaintiff might become a public charge of the State of New York.

3. New York has an interest in requiring Northeast Airlines to maintain safe facilities elsewhere.

4. Northeast Airlines actively promotes its business in New York with New York citizens.

5. Defendant Northeast was qualified to do business in, was and still is engaged in extensive operations in New York.

6. The airplane tickets were purchased in New York from Northeast.

7. Plaintiff's decedent husband boarded the Northeast plane in New York.

8. Northeast's plane departed from New York, a regular terminal for its scheduled flights.

9. Most of the flight was conducted over New York.

This Court on certiorari ordinarily accepts determination of state law as found by the Court of Appeals in diversity actions, particularly when the same finding is made by the District Court, *Appalachian Power Co.* v. *American Institute*, 80 S. Ct. 16, 4 L.ed. 30 (1959); *General Box Co.* v. *United States*, 351 U.S. 159, 165; *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-708; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237. For this Court to refuse to do so here, or to attempt to substitute its determination of the sufficiency of New York's interest in the matter, in place of the determination made by the lower courts would result in the "flood of petitions" confidently expected by Mr. Justice Frankfurter in his dissenting opinion in *Rogers* v. *Missouri P. R. Co.*, 352 U.S. 500, 524, 542 (1957), although not from the source expected. Such petitions would call upon this Court to review lower court holdings in diversity actions on questions which are primarily factual, i.e., whether a state has a sufficient interest in or has sufficient contacts with the multistate matter in dispute to constitutionally warrant the application of its own law, in whole or in part, to the exclusion of the law of a sister state. Needless to say, the amount, nature and quality of the interests and contacts to be evaluated will rarely be the same in each case; and the possible variables are nearly endless.

The time of this Court should not be occupied with such minutiae, as was indicated in *Wells* v. *Simonds*

Abrasive Co., 345 U.S. 514, 517. See also *Pacific Employers Ins. Co.* v. *Industrial Acc. Comm'n*, 306 U.S. 493, 500 (1939), in which this Court eschewed the function of weighing and choosing between the conflicting state interests.

5. No constitutional issues are raised by the mechanics through which New York decides to carry out its public policy.

Since New York had sufficiently substantial contact with the activity in question to apply its own law, as found by all nine active Judges of the Second Circuit, it is clear that there was no violation of the full faith and credit clause (*Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 76 [1954]; *Richards* v. *United States*, 369 U.S. 1, 15 [1962]).

Peculiarly enough, the dissenting opinion *en banc* below holds that it would approve the result in the *Pearson* case if New York had applied its own law entirely, but quarrels with the identical result reached through the application of only part of New York law—that part which was necessary to achieve the public policy of New York. The very same procedure—partial application of Pennsylvania law to a death action created and brought under the Alabama death statute in Pennsylvania—was explicitly approved by this Court in *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1943).

Once the right of New York to apply its law is recognized, the mechanics adopted to apply its law and carry out its public policy certainly do not assume constitutional stature.

If New York can apply its own wrongful death statute in its entirety, then it obviously has the right to apply less than all of its law on the subject of wrongful death. New York is not required to define its interests in the broadest terms possible, and it need not ignore the Massachusetts law. It did that in *Kilberg*: "We will still require plaintiff to sue on the Massachusetts statute but we refuse on public policy grounds to enforce one of its provisions as to damages." (See petition, p. B-5). New York's intention not to completely ignore the laws of other states is shown in *Davenport* v. *Webb*, 11 N. Y. 2d 392 (1962) (Petition, p. B-21), wherein the court in a wrongful death action refused to apply a New York statute permitting recovery of interest on a judgment from the date of death where the law of the state where the injury and death occurred did not authorize any prejudgment interest. *Davenport* represents a case in which New York determined, for reasons satisfactory to itself, that its interests and policies concerning prejudgment interest were not as strong as its fundamental policy against an arbitrary limitation on the amount of damages recoverable in death cases. The court was merely acting with restraint in defining New York's interests, insisting on the application of the law of the forum only where the adverse effect of foreign law on New York's interests is destructive.

Much of Judge Friendly's dissent amounts to flogging the dead horse of "procedure-substance" in view of the fact that the New York Court of Appeals in *Davenport* v. *Webb, supra*, limited its decision in *Kilberg* merely to an expression of New York's "strong policy with respect to *limitations* in wrongful

death actions." (See Petition, p. B-24). Petitioner acknowledges this in its petition, at pp. 9-10. The remainder of the dissent consists of hair-splitting, which concedes New York's right to ignore the entire Massachusetts death act, but not part of it.

6. The decision below is correct, and could not be reversed without reverting to the 19th Century "vested rights" doctrine of territorial sovereignty.

In order to circumvent the controlling precedents cited in this brief (particularly *Wells* and *Richards*), it would be necessary to revert to the outmoded "vested rights" doctrine of territorial sovereignty, and hold that the happening of the accident in Massachusetts forever fasted the Massachusetts law to the case, never to be dislodged regardless of the interests of New York in the case. It is necessary to go back to the 1904 decisions of this Court in order to find support for this doctrine (*Slater* v. *Mexican National R. Co.*, 194 U.S. 120; *Davis* V. *Mills*, 194 U.S. 451). The majority in the panel opinion below found it necessary to cite *Slater* and *Mills* in order to support its position (Petition, p. A-17).

Respondent respectfully submits that the "vested rights" doctrine has long been in discard and is not the law today; see *Watson* v. *Employers Laibility Assur. Corp.*, supra; *Griffin* v. *McCoach*, 313 U.S. 498 (1941); *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201 (1941); *Klaxon* v. *Stantor Electric Mfg. Co.*, supra; *Richards* v. *U.S.A.*, supra; *Zogg* v. *Penn Mutual Life Ins. Co.*, 276 F. 2d 861 (2d Cir. 1960); *Gainness* v. *Miller*, 291 Fed. 769, 770 (S.D. N.Y.

1923), aff'd 299 Fed. 538 (2d Cir. 1924), aff'd *sub nom. Hicks* v. *Guinness*, 269 U.S. 71 (1925).

7. No issues are raised under the Due Process Clause or the Privileges and Immunities Clause.

Petitioner also argues violations of the Due Process Clause of the Constitution (Amendment XIV, Sec. 1), and the Privileges and Immunities Clause (Article IV, Sec. 2), at pages 3 and 4 Petition.

The Due Process argument assumes that Northeast Airlines acquired property rights in the limitations of the Massachusetts law at the moment when its airplane crashed. Therefore, this is no more than an offshoot of the "vested rights" argument harking back to the long-outmoded 1904 *Slater* and *Mills* decisions.

As to the Privileges and Immunities argument, Petitioner itself admits that here is no such issue in this case (Petition, pg. 3, footnote), so that Respondent will not belabor the question.

Conclusion

The *en banc* decision below was well within existing precedents, and no constitutional issues are raised by the petition. There are no "special and important reasons" warranting review by certiorari. No question has been decided below in conflict with any applicable decision of this Court, or which has not been settled by this Court. The decision below followed the

applicable state law, and therefore is not in conflict with state law. The decision below is not in conflict with any decision of any other Court of Appeals. Accordingly, the petition should be denied.

Respectfully submitted,

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